81-2001

Office - Supreme Court, U.S.
FILED
JUN 7 1982
ALEXANDER L. STEVAS,
CLERK

NO:

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

RAYMOND, JAMES, & ASSOCIATES, INC.

Petitioners,

vs.

ROGER L. SUMMER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE O. MITCHELL
of Lane Mitchell & Harris, P.A.
900 Security Trust Building
700 Brickell Avenue
Miami, Florida 33131
Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FORMER FIFTH CIRCUIT'S REVERSAL OF THE TRIAL JUDGE'S DECISION THAT SUMMER'S FEDERAL SECURITIES REGULATIONS CLAIMS WERE TIME BARRED WAS APPROPRIATE, WHERE THE APPELLATE COURT DETERMINED THAT THE TOTALITY OF CIRCUMSTANCES KNOWN BY OR AVAILABLE TO THE PLAINTIFF, IN THE EXERCISE OF DUE DILIGENCE, WERE INSUFFICIENT TO EXCITE THE REASONABLE INVESTOR TO DISCOVER THE FRAUD PERPETRATED AND SUBSEQUENTLY CONCEALED BY THE DEFENDANTS.

II. WHETHER THE TRIAL JUDGE'S SUMMARY DISPOSITION OF PLAINTIFF SUMMER'S FEDERAL SECURITIES REGULATIONS CLAIMS WAS PROPERLY REVERSED, WHERE QUESTIONS OF MATERIAL FACT JUSTIFYING INVOCATION OF THE EQUITABLE TOLLING DOCTRINE WERE IN DISPUTE AND WHERE THE DEFENDANTS HAD NOT SHOWN, AS A CERTAINTY, THAT UNDER NO SET OF CIRCUMSTANCES COULD PLAINTIFF POSSIBLY SUCCEED ON HIS CLAIMS.

OPINIONS BELOW

The Former Fifth Circuit's opinion in Summer v. Land & Leisure, Inc., et al., is reported in 664 F.2d 965 (5th Cir. 1981). The opinion of the United States District Court for the Southern District of Florida, is unreported. However, the trial court's opinion is included in the Appendix of Petitioners Raymond, James & Associates' Brief, App. 13-18.

JURISDICTION

Petitioners Raymond, James & Associates, Inc. seek review of the Former Fifth Circuit's decision rendered on December 28, 1981, and the denial of rehearing rendered on January 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	ii
JURISDICTION	ii
TABLE OF AUTHORITIES	iv,v,vi
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3-6
I	7-12
II	13-20
CONCLUSION	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

CASES	Page
Aboussie v. Aboussie, 441 F.2d 150 (5th Cir. 1971)	1
Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1967)	1,2,7,11,16
Bailey v. Glover, 21 Wall. (88 U.S.) 342 (1875	9,10,13
Berry Petroleum v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975)	1,14,15
Burnett v. New York Central Railroad Co., 380 U.S. 424 (1965)	18
Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957)	2,15
Cook v. Avien, Inc. 573 F.2d 685 (1st Cir. 1978)	16,19
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)	14
Evans v. International Typographical Union, 81 F.Supp. 675 (D.C. Ind. 1948)	14
Exploration Co., Ltd. v. U.S., 247 U.S. 435 (1917)	10
Gaudin v. KDI Corp., 576 F.2d 708 (6th Cir. 1978)	16
GSEC v. Capital Gains Bureau, 375 U.S. 180, 86 (1963)	7
Hudak v. Economics Research Analysists, Inc., 499 F.2d 966 (5th Cir. 1974)	20
Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974)	15

	Page
Jablon v. Dean Witter & Co., 614 F.2d (9th Cir. 1980)	18
Klein v. Bower, 421 F.2d 338 (2d Cir. 1970)	1,14,15
Klein v. Shields, 470 F.2d 993 (7th Cir. 1969)	15
Laundry Equipment Sales Corp. v. Borg-Warner Corp., 334 F.2d 788 (7th Cir. 1964)	17
Leone v. Aetna Casualty & Surety Co., 599 F.2d 566 (3d Cir. 1979)	18
Maty v. Grasselli Chemical Co., 303 U.S. 197, at 200-01, 58 S.Ct. 509 (1938)	13,14
Morgan v. Koch, 419 F.2d 993 (7th Cir. 1969)	19
Stearns v. Page, 7 How., 819	13
Summer v. Land & Leisure, Inc. 664 F.2d 965 (5th Cir. 1981)	ii,2,13,16
Tinkoff v. U.S., 211 F.2d 890 (7th Cir. 1954)	17
Turner v. Lindquist, 377 F.2d 44 (9th Cir. 1967)	16,17
Wood v. Carpenter, 101 U.S. 807 (1879)	7,8,10,13
STATUTES	
28 U.S.C. § 1245(1)	ii
Secutities Act of 1933	
§§ 11, 12	2
§ 17, 15 U.S.C. §77q	1

	Page
STATUTES	
Securities Act of 1933 §17, 15 U.S.C. § 77q	1
Securities Exchange Act of 1934 §10(b), 15 U.S.C. § 78(b)	1,19
Florida Statutes §607.084	13
RULES	
Rule 10b-5, 17 C.F.R. 240.10b-5	1,19
Rule 12(b)(6), Fed.R.Civ.P.	2
Rule 56, Fed.R.Civ.P.	15
OTHER AUTHORITIES	
Duke L.J. p. 753 (1975)	19

STATEMENT OF THE CASE

Petitioners Raymond, James & Associates, Inc. petition this Court for review of the Former Fifth Circuit's decision which reversed the trial judge's dismissal of Plaintiff Summer's claims brought under federal securities regulations. The trial court in the instant case, United States District Court for the Southern District of Florida, Judge Jose A. Gonzalez, Jr., presiding, granted Defendants' Motion to Dismiss for failure of the complaint to state a claim for which relief can be granted by Order dated May 2, 1979. (See Brief for Raymond, James & Associates, Inc., A. 14-17). Final Order was entered on January 30, 1980. Id., at A. 18.

The trial judge followed the procedure set forth in Azalea Meats, Inc. v. Muscat for determining when the clock starts to run for the purpose of applying a borrowed state statute of limitations to a federally created cause of action. Id., citing 386 F.2d 5 (5th Cir. 1967). Furthermore, the trial judge stated the rule announced by the Fifth Circuit in Aboussie v. Aboussie, that "the statute of limitations in 10(b) actions begins to run from the time a person has actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation." Id., citing Aboussie, 441 F.2d 150 (5th Cir. 1971).

However, the trial judge erroneously decided that application of the equitable tolling doctrine of fraudulent concealment as developed in Klein v. Bower, 421 F.2d 338 (2d Cir. 1970) was not warranted in the instant case because Summer did not exercise due diligence or care in discovery of facts which would have put him on notice of facts constituting fraud. Thus, the Former Fifth Circuit reversed the trial judge's erroneous decision that Summer's § 17 (Securities Act of 1933), § 10(b) and Rule 10(b)(5) (Securities Exchange Act of 1934) claims were time barred by the respective limitation provisions, "borrowed" from analogous Florida Statutes. Id., citing Klein v. Bower and Berry Petroleum v. Adams & Peck, 518 F.2d 401, at 412 (2d Cir. 1975).

The Fifth Circuit affirmed the trial court's decision that Summer's claims under § 11 and § 12(b) of the Securities Act were absolutely barred under that Act's express statute of limitations provision, but reversed the trial court's decision that Plaintiff Summer did not allege facts sufficient to toll the applicable state statute of limitations in regard to his § 10(b) and § 17 claims. Summer v. Land & Leisure, Inc., 664 F.2d 965 (5th Cir. 1981). The court reviewed the three facts the trial court found dispositive: (1) Summer's knowledge that Land & Leisure did not hold annual shareholder meetings; (2) that Land & Leisure failed to send out annual shareholder reports; and (3) Summer's knowledge of the price decline of Land & Leisure shares. Id., at 969. After disposing of the Defendant's arguments, the Fifth Circuit held "the three facts relief upon by the district court are simply not sufficient to justify" a Rule 12(b)(6) dismissal. id., at 970, as against all Defendants but Arthur Young & Company and Raymond, James & Associates. The Former Fifth Circuit granted Summer leave to amend as to these Defendants, determining that Summer's complaint did not, as to these Defendants, allege sufficient facts to invoke the equitable doctrine of tolling. Id., at 970-71.

In reversing the trial court in this case, the Former Fifth Circuit pointed out the judicial preference for reserving to the jury questions of fact in regard to plaintiff's due diligence as required under the equitable tolling doctrine. Summer, supra, at 970, citing Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1967). In order to be entitled to a dismissal under F.R.C.P. 12(b)(6), defendants were required to show "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief," Id., at 970, citing Conley v. Gibson, 335 U.S. 45-46, 78 S.Ct. at 101-02. The Former Fifth Circuit stated that several factual situations in which the decline in the price of Land & Leisure stock "would not be indicative of fraud in the least, e.g., a depressed real estate market caused either by tight money or recession." Id., at 969.

STATEMENT OF THE FACTS

Beginning June 24, 1971 and ending January 3, 1973, Plaintiff Summer purchased in the over-the-counter market some 9,500 shares of the common stock of the defendant corporation Land & Leisure, Inc. through Raymond, James & Associates, Inc., an independent underwriter. This purchase was for the total consideration of $54,000, not including any brokerage commissions. (Brief for Petitioners Raymond, James & Associates, Inc., A. 19-27).

The Defendants joined in this action are Land & Leisure, Inc., the issuer of the stock; Raymond, James & Associates, Inc., the lead underwriter; Arthur Young & Company, the public accounting firm which supplied accounting and auditing services to Land & Leisure, Inc. in connection with the preparation of the registration statement and Prospectus; and Guy Bailey, Sr., Guy Bailey, Jr., Robert Little, Jerome Grossman, Areca Stone Bailey, Charlotte Babcock, and Robert Fischer, who were, at times material to the allegations of the complaint, officers or directors (or both) of Land & Leisure, Inc. Id., A. 19-59. The complaint, paragraph 14, alleged that each of the Defendants either: (a) did the things complained of in the complaint; or (b) agreed and conspired to do the things complained of in the complaint or (c) aided and abetted each other in doing said things; or (d) at all times material to this action directly or indirectly controlled and/or was a controlling person of Land & Leisure, Inc. within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. Id., at A. 21, 22.

As lead underwriter, Raymond, James & Associates, Inc. was responsible for putting together the underwriting group which placed the shares of Land & Leisure, Inc. stock into the hands of the public, including Roger L. Summer. In return for creating a market for the stock and for other underwriting services, Raymond, James & Associates, Inc. received compensation in a range, according to the prospectus, from $180,000 to $356,000. Raymond James & Associates, Inc. was also given an option to purchase up to 20,000 shares of the common stock of the company on the same terms and prices as

in the initial offering. And, in addition to the above discussed monetary compensation, Raymond, James & Associates, Inc. had its nominee, Thomas A. Hamilton, elected to the Board of Directors of Land & Leisure, Inc. Mr. Hamilton remained a director of Land & Leisure, Inc. until February 17, 1972.

The complaint alleged that the prospectus prepared by Land & Leisure, Inc., Raymond, James & Associates, Inc. and Arthur Young & Company contained false and fraudulent statements as well as omissions of material fact necessary in order to make the statements made therein not misleading. (See paragraph 25 of the complaint, Id., at A. 28-31). These misrepresentations included among others: (1) the failure to disclose that an individual by the name of L. R. Brooks was a controlling shareholder of Land & Leisure, Inc. by virtue of his ownership or beneficial ownership of shares standing in the names of other individuals or corporations; (2) the failure to disclose that L. R. Brooks controlled the day-to-day operations and management of the company; (3) the representation that the company's property known as "Westview" was similar in characteristics to the property known as "Westfield," when in fact the Westview property, comprised of approximately 1,000 acres, was at all times under water, ranging in depth from 2 feet to over 16 feet, lacked access from any improved road or highway, and in order to drain would cost nearly $40 million, a sum far in excess of the total projected sales price for the property; (4) the representation that all land to be sold to third parties by Land & Leisure, Inc. had been registered with the Florida Land Sales Board, when in truth 112 of the 656 units, or 17% of the land to be sold by Land & Leisure, Inc., had not been registered; (5) the failure to disclose that Land & Leisure's accounting firm, Arthur Young & Company, was owed the sum of $85,000 for past due accounting and auditing fees, and that as a result, Land & Leisure, Inc. had pledged accounts receivable to Arthur Young in the amount of $127,000 and additionally failed to disclose that an agreement had been reached between Land & Leisure and Arthur Young that the accounting firm would be paid from the proceeds of the public offering; (6) the representation that part of the proceeds of the "Chuck Connors Wonderful West"

entertainment complex on the company's Westfield property, when in truth Land & Leisure's officers and directors had already determined not to build and develop the "Chuck Connors Wonderful West" complex, nor honor its contract with Chuck Connors; and (7) the failure to disclose that Land & Leisure was in default under the terms of its mortgages encumbering Westfield, Westview and Westmont properties, and Land & Leisure had entered into an agreement with the mortgagee, William Moser and/or National Oil & Gas, Inc., whereby said defaults were to be cured by using $350,000 from the proceeds of the sale of stock, money which the prospectus stated was to be allocated to the development of the "Chuck Connors Wonderful West" complex. Id.

The prospectus prepared by Land & Leisure, Inc., Raymond, James & Associates, Inc. and Arthur Young & Company, was intended to bring about the sale of $1,600,000 in shares of stock and $2,000,000 in collateralized subordinated sinking fund debentures issued by Land & Leisure, Inc. The complaint alleged that at the time the prospectus was prepared, Defendants Land & Leisure, Inc., Robert Little, Jerome Grossman, Arthur Young & Company, and Raymond, James & Associates, Inc. knew that the prospectus contained false statements and omissions of material facts (Count III) or negligently permitted or caused the prospectus to be filed or negligently assisted in the preparation of the prospectus, which was filed with false and misleading representations. (Count IV). Id., A. 27-34.

On or about February 16, 1972, control of the Defendant Land & Leisure was sold to United Resources, Inc., a Florida corporation. Control was acquired by the sale of the stock of certain insiders, Defendant Robert Little, one L. R. Brooks, Defendant Jerome Grossman, and Cordwell International Developments, Ltd.. At this meeting, United Resources, Inc. caused the resignation of Defendant Robert Little, and one Thomas Hamilton, Oscar Cordera, Arthur Papazian, and Jack Lasonder. In the places of these directors, United Resources, Inc. caused the election of Defendants Guy Bailey, Sr., Guy Bailey, Jr., Areca Stone Bailey, and Charlotte Babcock, as well as one Steven W. Arkey, to the Board of Directors of Land & Leisure, Inc. Id., at A. 39-46.

The new Board of Directors, Guy Bailey, Sr., Guy Bailey, Jr., Areca Stone Bailey and Charlotte Babcock, according to the complaint, knew or should have known, by the exercise of ordinary care, that the prospectus contained misstatements of material fact and omissions of material facts necessary in order to make the statements made therein not misleading. These Defendants also knew or should have known that the misrepresentations and inaccuracies contained in the prospectus should have been disclosed by the filing of a post-effective amendment to the registration statement, or the filing of a current report on Form 8-K or through other public announcement. Notwithstanding this actual or constructive knowledge, the new directors, aided and abetted by the old officers and directors and the underwriters (Raymond, James & Associates, Inc.) and accountants (Arthur Young & Company), joined in and continued the scheme and conspiracy to prevent disclosure of the true condition of Land & Leisure, Inc. Id.

I

THE FORMER FIFTH CIRCUIT'S REVERSAL OF THE TRIAL JUDGE'S DETERMINATION THAT PLAINTIFF SUMMER'S FEDERAL SECURITIES REGULATIONS CLAIMS WERE TIME BARRED WAS APPROPRIATE, SINCE FACTS KNOWN BY OR AVAILABLE TO PLAINTIFF IN THE EXERCISE OF DUE DILIGENCE, WERE INSUFFICIENT TO EXCITE A REASONABLE INVESTOR TO DISCOVER THE FRAUD PERPETRATED AND SUBSEQUENTLY CONCEALED BY THE DEFENDANTS NAMED IN THE COMPLAINT.

Petitioners Raymond, James & Associates, Inc. maintain that the decision of the United States Court of Appeals for the Former Fifth Circuit "has created a state of confusion over the tolling of statutes of limitation in fraud cases brought under federal statutes," and conflicts "both with the law of this Court particularly as set forth in Wood v. Carpenter, 101 U.S. 807 (1879), and with decisions of other United States Circuit Courts of Appeals." (Brief for Petitioners Raymond, James & Associates, Inc., pp.4-5). The Former Fifth Circuit's opinion so conflicts with settled laws and principles controlling securities regulation, Petitioners continue, that the securities industry and investors are uncertain as to the proper guidelines for suits brought under federal law, that determination of the questions presented in the instant case warrants review by this Court. Id., at 5. Respondent Summer vehemently challenges these contentions, and herein demonstrates that the Former Fifth Circuit's decision is in harmony with both the law of this Court and with decisions of the other United States Circuit Courts of Appeals. Rather, the Former Fifth Circuit's opinion furthers the objectives embodied in the Federal Securities Act of 1933 and the Federal Securities Exchange Act of 1934, i.e., "full disclosure . . . to achieve a high standard of business ethics in the securities industry." Azalea Meats, Inc. v. Muscat, 386 F.2d 5, at 9 (5th Cir. 1967), citing GSEC v. Capital Gains Bureau, 375 U.S. 180, 86 S.Ct. 275, at 278 (1963). (See Respondent Summer's Brief in Opposition to Writ of Certiorari, Land & Leisure, Inc., et al., Petitioners, p. 9).

In Wood v. Carpenter, the plaintiff sued the defendant for fraudulently withholding title to property subsequent to assignment of all his property for the benefit of his creditors. 101 U.S. 807 (1879). Defendant allegedly defrauded the plaintiff and others by "depreciating the value of their claims against him," and thereby induced the plaintiff to sell the claims to him for less than their face value. Id. Title to the property in dispute in Wood "was held in secret trust for him [defendant Carpenter] by his brother Alvin and others, and was fraudulently concealed from plaintiff until long after the assignment of the judgments." Id. As for plaintiff's burden of demonstrating circumstances justifying invocation of the equitable tolling doctrine, the complaint merely states that plaintiff Wood "had no knowledge of the ownership of the property by the defendant, nor of the secret trust, nor of the falsity of his representations, as alleged, until during the year 1872." Id.

Because the plaintiff did not request leave to amend his complaint, the trial court sustained defendant's demurrer, on the ground that plaintiff's claims were barred by the Indiana statute of limitation applicable to fraud. Id., at 807-808. This statute provided that actions for fraud must be commenced within six years and that the statute begins to run when the fraud is perpetrated. Id. Since the complaint itself averred that the judgments against Carpenter were assigned on the first of January, 1864 and since "[t]he cause of action then accrued, and the statute began to run," the Supreme Court only had to consider whether the concealment on defendant's part were such as to bring the plaintiff's claim "within the time limited, after the discovery of the cause of action." Id., at 808. The Court found that plaintiff's naked averment that "he had no knowledge of the facts so concealed by the defendant until the year A.D. 1872, and a few weeks only before the brining of this suit," was insufficient to satisfy the plaintiff's duty of reasonable diligence. Id., at 808-09. The Court held that the facts known to the plaintiff were sufficient to charge him with constructive notice of the fraud:

> "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everthing to which such inquiry might have led. When a person has suffi-

> cient information to lead him to a fact, he shall be deemed conversant of it." Kennedy v. Green, 3 Myl. & K., 722. "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have reasonably detected it, he reasonably had knowledge of it." Ang. Lim., Sec. 187 and n. Id., at 809.

Moreover, the Court held that defendant's fraudulent concealment was not such as to relieve plaintiff of the duty to exercise due diligence:

> "The fraud and deceit which enable the offender to do the wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation.
>
> "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.
>
> "There must be reasonable diligence, and the means of knowledge are the same thing in effect as knowledge itself." Id.

The equitable tolling doctrine, which requires a plaintiff to exercise reasonable diligence in the pursuit of federally-created claims where a defendant has concealed his fraudulent activity, plays an integral part in assuring that the statutes of limitations are not used as a vehicle to immunize fraud from prosecution merely because a statutory period has expired. Consider Mr. Justice Miller's decision in Bailey v. Glover, construing the Bankruptcy Act of 1867:

> "They [statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did

> exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which it is made successful and secure." Exploration Co., Ltd. v. U.S., 247 U.S. 435, S.Ct. 537 (1917), citing Bailey v. Glover, 21 Wall. 342, 22 L.Ed. 636.

The statute of limitation which the Court found applicable to the creditor's fraud claim in Wood contained a provision comparable to the equitable tolling doctrine adopted from the chancery. 101 U.S. at 808. In fact, the Supreme Court had outlined the parameters of the equitable tolling doctrine just four years before their decision in Wood. Bailey v. Glover, supra, at 636. Moreover, dicta in Bailey stated that the statute of limitations in fraud cases will be tolled even though there are no special efforts by the party committing the fraud to conceal it from the other party. 88 U.S. 342, at 348 (1874). Thus, the Supreme Court in Bailey v. Glover held that "the bar of the statute [of limitations] may also be avoided by proof of fraud committed under such circumstances as to conceal from the plaintiff all knowledge of the fraud, and thus prevent him from asserting his right until a period beyond the time limited by the statute." 88 U.S. 636, at 637 (1875).

Petitioners Raymond, James & Associates, Inc. contend that "even the most unsophisticated investor could have examined the public records to determine if annual reports had been filed, would have known that no notice of shareholders meeting or minutes or other reports had been sent to him, and could have examined the real estate listed in the prospectus." (Petitioners Raymond, James & Associates, Inc.'s Brief, p.6). Proceeding under the imputed knowledge theory advanced in Wood v. Carpenter, note 2, supra, Petitioners contend that from the abovementioned indicia Summer should be charged with knowledge sufficient to bar his "stale claim" and that, contrary to the Fifth Circuit's determination, no question of fact remained as to Plaintiff's due diligence.

The fact that Land & Leisure filed no annual reports would not necessarily lead a reasonable investor to suspect the existence and scope of the type of fraud presented by the instant case. First of all, the 10K form Petitioners point to is not normally sent to shareholders. Secondly, the SEC, the agency entrusted with assuring compliance with securities regulations, itself did not act upon Land & Leisure's failure to file 10K forms.

As to the contention that no notice of annual shareholder meetings or minutes had been sent to Summer, Respondents fail to note that the provision of Florida's Corporations Code in effect at the time did not require Land & Leisure to hold shareholder meetings. (See Respondent Summer's Brief in Opposition to Writ requested by Arthur Young, p.3, note 3). Again, even if violative of the Corporation Code, however, the failure of Land & Leisure, Inc. to hold shareholder meetings would not necessarily have excited the reasonable investor to investigate for the type of fraud perpetrated by the Defendants in the instant case. Moreover, Defendants here conspired to conceal their fraudulent activities and were reticent in releasing information Plaintiff requested and even after the Eleventh Circuit in and for Dade County had ordered them to do so. (Brief for Raymond, James & Associates, A. 33-34, citing Coutn III of Summer's Complaint).

Lastly, as to the contention that Plaintiff Summer could have examined the real estate listed in the prospectus and the inference that since he could have and did not do so, his claims should now be barred, Respondents have entirely negated the fundamental policy behind the federal securities laws. Azalea Meats, Inc. v. Muscat, supra, p.2. Respondents would have the securities industry return to the days of caveat emptor, when a buyer was without protection and at the mercy of ruthless sellers. To purport that investors are under some duty to examine all property proportionally represented by their shares, would destroy the atmosphere of trustworthiness and reliability of prospectus materials and investment brokers which the Securities Acts have engendered and upon which investors have relied for nearly half a century.

In summary, Respondents' contention that "obviously questionable circumstances," treated above, would have led Plaintiff Summer, in exercise of due diligence, to uncover the fraudulently concealed source of Plaintiff's injury is without merit.

II

THE TRIAL JUDGE'S DISMISSAL OF PLAINTIFF SUMMER'S CLAIMS BROUGHT UNDER FEDERAL SECURITIES REGULATIONS WAS INAPPROPRIATE WHERE QUESTIONS OF MATERIAL FACT, INCLUDING CONSTRUCTIVE NOTICE OF THE ALLEGED FRAUD, PLAINTIFF'S DUE DILIGENCE IN DISCOVERING THE ALLEGED FRAUD AND DEFENDANTS' FRAUDULENT CONCEALMENT, WERE IN DISPUTE AND THUS THE FORMER FIFTH CIRCUIT'S DECISION THAT THE TOLLING ISSUE WAS NOT PROPERLY RESOLVED BY IN LIMINE DISPOSAL SHOULD BE UPHELD.

While the principles of due diligence outlined in Bailey and Wood have withstood the test of time, it is important to note that those Supreme Court decisions preceded the enactment of the Federal Rules of Civil Procedure by over half a century.[1] Thus, Plaintiff's shortcomings in regard to pleading details of the fraud alleged in Wood, such as "the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is," were fatal when "held to the stringent rules of pleading and evidence" then in force. Id., at 808, citing Stearns v. Page, 7 How., 819 at 829. In contrast, Rule 8 Fed.R.C.P. sets forth the liberal pleading requirements now employed by federal courts. Thus, the Former Fifth Circuit, following the lead given by this Court in Maty v. Grasselli Chemical Co., granted Plaintiff Summer leave to amend the complaint as Arthur Young & Company and Raymond, James & Associates, Inc., in order to allege facts sufficient to invoke the equitable doctrine of tolling. Summer v. Land & Leisure, Inc., 664 F.2d 965, at 970-71 (5th Cir. 1981). For the court held in Maty that:

"Pleadings are intended to serve as a means of arriving at fair and just settlements of con-

---

[1]Likewise, the Supreme Court's decisions in Bailey and Wood preceded the Securities Act of 1933 and the Securities Exchange Act of 1934. These Acts modified the common law requirements for showing fraud both in their terms and in their interpretation by subsequent courts. Congress, in enacting the securities regulations, however, did not see fit to upset the then already settled judicially created equitable tolling

> troversies between litigants. They should not raise barriers which prevent the achievement of that end. The original complaint in this cause and the amended complaint were not based upon different causes of action. They referred to the same kind of employment, the same general place of employment, the same injury and the same negligence. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. 303 U.S. 197, at 200-01, 58 S.Ct. 509 (1938).

Petitioners contend that facts which appear on the face of Summer's complaint should bar his actions (Raymond, James & Associates, Inc.'s Brief, p.8). Moreover, Petitioners contend that Klein v. Bower, 421 F.2d 338, at 344 (2d Cir. 1970) and Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975) dictate such summary disposition of the claims presented in the instant case, and that the Former Fifth Circuit's decision directly conflicts with the holdings of the Second Circuit. Id.

Petitioners' contentions here do not hold water. Not only must the complaint be read in the light most favorable to Plaintiff on motion for dismissal pursuant to Rule 12(b)(6), Fed.R.Civ.P., it must also be read in its entirety. Evans v. International Typographical Union, 81 F.Supp. 675 (D.C. Ind. 1948). Summer's complaint sufficiently stated facts, which taken as true, would toll the running of the limitations provisions. Thus, at the very least, unrefuted allegations of Defendants' fraudulent concealment merit a factual determination of Plaintiff's due diligence in pursuing his claims. Nor are Petitioners correct when they state that the Former Fifth Circuit isolated the circumstances presented in the instant case. (Brief for Raymond,

---

doctrine, and deliberately left the statute of limitations issue in 10(b) actions to the courts. Ernst & Ernst v. Hochfelder, 425 U.S. 185 at 210, n. 29, 96 S.Ct. 1375, at 1389 (1976).

James & Associates, Inc., pp.8-9). Rather, the Former Fifth Circuit held that given the totality of facts presented to the trial court, the Defendants in the instant case were not entitled to dismissal as a matter of law. 664 F.2d 965, at 970 (5th Cir. 1981).

This Court is well-versed in the different standards imposed by Rule 12(b)(6), Fed.R.Civ.P., and by Rule 56, Fed. R.Civ.P., as well as their interrelationship. (See Summer's Brief in Opposition to Land & Leisure,p.14). "A motion under Fed.R.Civ.P. 12(b)(6) to dismiss for failure to state a claim can be granted only if it appears beyond doubt that Plaintiff can prove no set of facts in support of his or her claim." Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957). Thus, Klein v. Bower, supra, Berry, supra, Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974) and Klein v. Shields, 470 F.2d 993 (7th Cir. 1969) are distinguished from the instant case in that summary judgments were at issue there.

Moreoever, the Second Circuit's decision in Berry neutralized plaintiff's argument that he could not have known about the corporation's financial difficulties by pointing out the fact that a proxy statement was circulated there. Id., at 410, note 9. Moreover, Summer did not have the benefit of a publicized consent order secured by the SEC nor notice of prior private actions brought against the Defendant on substantially similar facts, as in Berry. Id. Especially noteworthy in distinguishing Berry from the instant case is that res judicata provided alternative grounds for summary disposition as to all but four class members. Id., at 411. Nonetheless, the Court's treatment of the claims presented in Berry do have some bearing on the disposition of the instant case. For example, the Court there stated that the broad remedial policies of federal securities laws are best served by longer, not shorter, statutes of limitations. Id., at 409. Thus, the Second Circuit implicitly held that the policies underlying federal securities laws outweigh the general policies underlying statutes of limitations. Furthermore, in determining that the plaintiff, contrary to allegations contained in the complaint, could have discovered the alleged fraud within the statutory limitation period had he exercised due diligence, the Second Circuit reinforced the

principles developed by this court in Bailey and in Wood.

Gaudin v. KDI Corp. also involved a motion for summary judgment. 576 F.2d 708 (6th Cir. 1978). However, the defendant's motion there was granted, inter alia, because the transaction there was not a "purchase" or "sale" for the purpose of § 10b. While Respondent Summer does not take contention with the proposition cited by the Petitioners, i.e., that investors must exercise due diligence in the protection of their investments and in the pursuit of federally created claims, he points out that the facts presented in the instant case sufficiently distinguish it from the result in Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978). (Brief for Petitioners Raymond, James & Associates, Inc., p.9).

In reversing the trial court in the instant case, the Former Fifth Circuit pointed out the judicial preference for reserving to the jury questions of fact in regard to plaintiff's due diligence as required under the equitable tolling doctrine. Summer, supra, at 970, citing Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1967). Neither Land & Leisure's failure to hold annual shareholder meetings nor its failure to send reports thereof were "sufficient to put an investor on notice of facts which in the exercise of due diligence would have led to actual knowledge of fraud." Id. The Court distinguished Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978), in which a shareholder meeting was, in fact, held. Id. Furthermore, the Former Fifth Circuit stated that several factual situations in which the decline in the price of Land & Leisure stock "would not be indicative of fraud in the least, e.g., a depressed real estate market caused either by tight money or recession." Id., at 969. The Former Fifth Circuit pointed out the inconsistency in Defendants Raymond, James & Associates, Inc.'s argument that the decline in price of Land & Leisure stock did or should have put the reasonable investor on notice of some type of fraud, in that neither the independent accounting firm, Arthur Young, nor Raymond, James & Associates, the underwriter, were put on notice of the alleged fraud. Id.

Turner v. Lundquist involved an appeal from dismissal and summary judgment. 377 F.2d 44 (9th Cir. 1967). There

the subject matter in dispute consisted of convertible debentures. Id., at 46. However, since the appellate court concurred with the trial court that the suit was barred by the statute of limitations, the Ninth Circuit did not reach the question on the Motion to Dismiss. Id. Voluminous affidavits supports defendant's motion for summary judgment were presented to the trial court. Id. Moreover, plaintiff "Turner filed no controverting affidavit on his own belief." Id., at 47. Additionally, the court relied on several letters and fiscal statements sent to the plaintiff in finding facts sufficient to charge plaintiff with notice and to impose a duty of inquiry with which plaintiff did not comply. Id., at 48, note 1.

The Seventh Circuit echoed the court in Turner, supra, by holding that plaintiff's claims there were time barred. Morgan v. Koch, 419 F.2d 993, at 997 (7th Cir. 1969). In contrast to the instant case, both of the abovementioned cases dealt with an indifferent plaintiff. Thus, the requirement that plaintiff exercise due diligence protects defendants against stale claims, where a plaintiff has slept on his or her rights. "[T]he statute [of limitations] is tolled only for those who remain ignorant through no fault of their own. Unawareness of facts or law, alone, does not justify suspending the operation of the statute. Id., at 997, citing Tinkoff v. U.S., 211 F.2d 890 (7th Cir. 1954) and Laundry Equipment Sales Corp. v. Borg-Warner Corp., 334 F.2d 788 (7th Cir. 1964).

Similarly, in Jablon, the Ninth Circuit affirmed the trial court's summary disposition of plaintiff's 10b-5 claim where there were declining stock prices, coupled with a broker's affirmative misrepresentation that the stock in question would rise in value and that there would be both a split and an increase in dividends. Id., at 681, 682. Thus, the Ninth Circuit refused to invoke the equitable tolling doctrine, as plaintiff there requested. And since facts constituting constructive notice afforded plaintiff an opportunity and imposed some duty of inquiry with which the plaintiff had failed to comply, the court in Jablon held plaintiff's claims were time barred. Id.

As distinguished from the instant case, Jablon was decided on summary judgment, not a motion to dismiss. Id., at 682. Thus, as the Ninth Circuit pointed out in Jablon, "[w]hen a motion to dismiss is based on the running of the statute of limitations," as in the case at bar, "it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." Id., citing Leone v. Aetna Casualty & Surety Co., 599 F.2d 566 (3d Cir. 1979). Moreover, the subject matter in Jablon concerned marginal accounts, which are a type of loan made by a broker to an investor for a monthly fee, and not the type of securities purchased by Summer. 614 F.2d at 682, note 10. Thus, the very nature of the securities in Jablon provided the plaintiff with actual notice "of her stocks' declining value because she was periodically required to pay margin calls." Id. Lastly, the broker in Jablon made affirmative misrepresentations as to the bright future of the stocks in question and encouraged plaintiff there to purchase additional shares, despite the fact that concurrent price declines contradicted his earlier predictions. Id. In affirming the trial court's decision, the statute of limitations barred Jablon's 10b-5 action, the Ninth Circuit held that "a reasonably prudent person would have realized within two years that Turner's [the broker's] prediction was incorrect." Id., at 682-83.

The Supreme Court reversed dismissal of plaintiff's claims brought under the Federal Employers Liability Act in Burnett v. New York Central Railroad Co., 380 U.S. 424 (1965). Defendant had moved to dismiss on the grounds that FELA's statutory limitations provision had expired, but the Supreme Court ruled that the general policy of repose, "designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights." Id., at 1055. Notably, Burnett involved issues of proper venue, and dealt with a federal act which incorporates policies distinct from those embodied in federal securities regulations. (See Summer's Brief in Opposition to Petitioners Land & Leisure, Inc., p.9).

In determining whether an investor who brings action for negligent omission with respect to disclosure has made

reasonable inquiries, a court must consider, inter alia, nature of misleading statements alleged, opportunity to discover misleading nature of statements and subsequent actions of parties. Cook v. Avien, Inc., 573 F.2d at 697. Also, the existence of fiduciary relationships between Summer and the various defendants in the instant case, bears on the issue of Plaintiff's due diligence, and was not properly addressed by the trial court. Hupp v. Gray, 500 F.2d 993, at 997 (7th Cir. 1974), citing Morgan v. Koch, 419 F.2d 993, at 997 (7th Cir. 1969). While courts are called upon to apply an objective standard, with the advantage of 20-20 hindsight, the abovementioned criterion also must come into play in determining Plaintiff Summer's due diligence.[2] "Obviously, a plaintiff's due diligence burden can only be determined under the peculiar circumstances of each case. That burden will grow as the plaintiff's opportunity to detect the misrepresentation or prevent the fraud increases." "The Due Diligence Requirement for Plaintiffs Under Rule 10b-5," Duke L.J. 1975, p.753, at 762.

Given the unresolved issues of material facts, the Former Fifth Circuit's decision that in limine disposition of Plaintiff Summer's claim was unjustified should not be upset by this Court. The very fact that Summer brought suit against the Defendants in the instant case negates Petitioners' contention that Summer was imprudent and indifferent. Furthermore, the Respondent fails to see, contrary to the Petitioners' closing statement, how allowing Summer to have what he rightfully deserves,i.e., a trial on the merits of his claims, could possibly harm conscientious investors and dealers. (See Brief for Petitioners Raymond, James & Associates, Inc., p.12). Rather, to bar Summer's claims under

---

[2]The sophistication of the individual also has some bearing on the issues of constructive notice and due diligence in determining whether to invoke the equitable tolling doctrine. Thus, one commentator has classified plaintiffs according to the information available to them and thus the burden of inquiry imposed as (1) corporate insiders; (2) sophisticated investors; and (3) "ordinary investors." Petitioners in the instant case have not attempted to show any reason why Summer should be held to some standard more demanding than that for "ordinary investors." See "The Due Diligence Requirements for Plaintiffs Under Rule 10b-5," Duke L.J. 1975, p.753 at 762.

the facts presented in the instant case because the statute of limitations has run, would cause great damage to the securities industry and would reverse the longstanding principle that the "law does not require an aggrieved party to have proceeded from the outset as if he were dealing with thieves." Hudak v. Economics Research Analysists, Inc., 499 F.2d 966, at 1002 (5th Cir. 1974).

CONCLUSION

The Former Fifth Circuit appropriately reversed the trial court's dismissal, since it found that genuine issues of material fact were present and since Defendants had not established that Plaintiff Summer could prove no set of circumstances which would enable him to recover, supra. The broad remedial purposes of federal securities regulations would be seriously undermined should this Court modify the longstanding equitable tolling doctrine so as to time bar Plaintiff's claims. Having sufficiently alleged Defendant's fraudulent concealment and facts of Plaintiff's due diligence in pursuit of his claims, Summer is entitled to his day in court. This is so, regardless of the trial judge's assessment of Summer's claims of success on the merits, and is dictated by the Congressional mandate for openhandedness and trustworthiness in securities transactions.

Respectfully submitted,

LANE MITCHELL & HARRIS, P.A.
Attorneys for Summer
900 Security Trust Building
700 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 358-1405

By: GEORGE O. MITCHELL
GEORGE O. MITCHELL, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail to CARL D. LIGGIO, ESQUIRE, and EUGENE R. ERNSTOESSER, ESQUIRE, Arhtur Young & Company, 277 Park Avenue, New York, New York 10172 and PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A., 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, on this 3rd day of June, 1982.

By: GEORGE O. MITCHELL
GEORGE O. MITCHELL, ESQUIRE